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NO. 92-8346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TERRY LEE SHANNON,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FUNDAMENTAL RIGHTS OF EX-PATIENTS IN SUPPORT OF PETITIONER AND FOR REVERSAL OF JUDGMENT BELOW

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QUESTION PRESENTED

Does a proper interpretation of the Insanity Reform Act of 1984 require that the jury be instructed that a Not Guilty Only By Reason of Insanity verdict will not result in the release of a possibly dangerous defendant contrary to the public welfare?

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UNITED STATES OF AMERICA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FUNDAMENTAL RIGHTS AND EQUALITY OF EX-PATIENTS IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE JUDGMENT BELOW

I.
STATEMENT OF INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is being filed in support of the Petitioner and his arguments for an instruction to the jury regarding the disposition of the defendant after a successful plea of not guilty by reason of insanity ("NGRI") and for reversal of the judgment below. The counsel for the petitioner and respondent have both consented to the filing of this brief and their consents will be sent to the Court. This case is of paramount concern to all of the organizations participating in the advocacy of *amicus curiae*, the Coalition for the Fundamental

Rights and Equality of Ex-patients ("The Coalition for the Free").[1] The

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[1] The participants in the Coalition for the Free are as follows:

NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC., has advocated for the rights of persons with psychiatric disabilities in New York State for over seventeen years. Since 1987, NYLPI has provided protection and advocacy services to New York City residents with psychiatric disabilities pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §10801, et seq. NYLPI has represented Amici before this Court in several cases including *Riggins v. Nevada*, __ U.S. __, 112 S.Ct. 1810 (1992).

PENNSYLVANIA PROTECTION AND ADVOCACY, INC. ("PP&A") is the federally mandated protection and advocacy agency in Pennsylvania for persons diagnosed as mentally ill pursuant to 42 U.S.C.A. § 10801 *et seq*. PP&A has represented persons who were raising the insanity defense. PP&A has been *amicus* in numerous cases, most recently, *Sullivan v. Zebley*, 493 U.S. 521 (1990) and *Riggins v. Nevada*, ____ U.S. ____, 112 S.Ct. 1810 (1992).

The MENTAL HEALTH CONSUMERS' NATIONAL LEGAL DEFENSE AND EDUCATION PROJECT was organized by consumers in Philadelphia, Pennsylvania in 1988 to provide technical assistance, research and training to

Coalition and many of its members have previously been involved as *amici* in

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mental health consumers and their advocates on legal and policy issues involving mental illness and consumers' rights, and to assist consumers with access to the courts, legislatures and agencies on matters affecting their lives as consumers of mental health services.

The MENTAL HEALTH PATIENTS' ASSOCIATION OF NEW JERSEY, established in 1984, is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

The MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA was formed in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

The NATIONAL ALLIANCE for the MENTALLY ILL (NAMI) is a national, grass roots advocacy organization of families of persons with serious mental illness and persons with serious mental illness themselves. Composed of over one thousand local affiliates and 140,000 members, its goals are to advance treatment and services for persons with serious mental illness and to improve the quality of life for those who are

similar cases in federal and state courts across the country,[2] as well as in other cases involving forensic issues before this Court.[3]

Many of the members of the Coalition's constituent groups are themselves mental health consumers who have had their own experiences with the issues of the insanity defense and other mental conditions during trial proceedings. Many of the other Coalition members are family members of, and advocates for,

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affected by these illnesses. An important aspect of NAMI's mission is to advocate for improvements in public systems of care and treatment for individuals with serious mental illness. NAMI is dedicated to the principle that persons with serious mental illness who become involved with criminal justice systems should receive appropriate treatment in appropriate treatment settings rather than jails and prisions.

[2] *See, e.g.*, the briefs *amicus curiae* filed by the Coalition in *Riggins v. Nevada*, ____ U.S. ____, 112 S.Ct. 1810 (1992) and *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515 (1986).

[3] *See, e.g.*, the briefs *amicus curiae* of the Coalition in *Washington v. Harper*, 494 U.S. 210 (1990) and in *Perry v. Louisiana*, ____ U.S. ____, 111 S.Ct. 449 (1990).

persons involved in issues related to the insanity defense. Because of the Coalition's long-demonstrated concern about the issues related to the insanity defense, particularly where an individual who has been diagnosed with mental illness is raising the insanity defense in a capital case, the Coalition has a strong interest in participating as *amicus curiae* in this case.

II. SUMMARY OF ARGUMENT

A. The requested instruction on disposition of persons found NGRI is necessary in order to assure that persons with legitimate basis for NGRI pleas have an opportunity to receive an appropriate verdict and whatever necessary treatment in non-prison settings before they are released into the community.

B. The "rule" in *United States v Rogers*, separating the function of jury and judge with regard to the guilt and sentencing phases of trial is neither uniform nor general. The rule is subject to limitations which support the argument for an exception for instructions regarding disposition of persons found NGRI.

C. Defendants seeking to be found NGRI are entitled to jury instructions on the disposition of NGRI's based on juror misunderstanding of NGRI dispositions, just as such defendants subject to prosecutor mistatements on disposition are now entitled to such instructions.

III. ARGUMENT

A. Without Disposition Instructions, Persons Who Would Otherwise Legitimately Be Found NGRI May Be Inappropriately Sentenced.

Two values should underlie the law on jury instructions regarding the disposition of defendants found NGRI and, in particular, the decision in this case and the other similar cases currently before this Court.[4] First, accused persons with legitimate bases for their NGRI pleas should receive fair

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[4] *Shannon v. United States*, 981 F.2d 759 (5th Cir. 1993), *cert.* granted, 62 U.S.L.W. 3342 (U.S. Nov. 1, 1993) (No. 92-8346); *Thigpen v. United States*, F.3d ___, Nos. 91-3236 and 91-8082, Slip Opinion, (11th Cir., Oct. 22, 1993), (*en banc*) petition for *cert.* filed, Nov. 15, 1993 (No. 93-6747) (consolidated with *Barnett v. United States*); *Barnett v. United States*, 989 F.2d 1116 (11th Cir. 1993), Nos. 91-3236 and 91-8082, Slip Opinion (11th Cir., Oct. 22, 1993) (*en banc*), petition for *cert.* filed Nov. 15, 1993 o. 93-6747)(consolidated with *Thigpen v. United States*); *United States v. Bogdanoff*, 993 F.2d 884 (9th Cir. 1993), No. 91-50492, Memorandum Opinion (9th Cir. May 24, 1993), petition for *cert.* filed Aug. 23, 1993 (No. 93-5743); and *Fisher v. United States*, No. 93-7002, Slip Opinion (3rd Cir. Nov. 10, 1993), petition for *cert.* filed Dec 8, 1993 (No. 93-7000).

consideration of their plea, with reasonable court guidance to minimize the risk that juries will erroneously find them guilty merely to remove them from society. Second, persons with legitimate bases for their insanity pleas should receive appropriate care and treatment in therapeutic facilities, not unwarranted confinement in prisons or jails.

The outlook for the first value -- accurate insanity verdicts unclouded by erroneous assumptions -- is bleak, absent guidance from the Court. Empirical research suggests that the public suffers from glaring misconceptions about the insanity plea. Members of the public believe that insanity acquittees go free; that they "beat the rap."[5] Indeed, this belief accords with commmon sense, which quality we wish jurors to bring to their deliberations.

Civics courses teach us from a very early age that a finding of guilt carries with it the prospect of punishment,

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[5] *See* Pogrebin, Regoli and Perry, "Not Guilty by Reason of Insanity: A Research Note," 8 *Int'l J.L. & Psychiatry* 237 (1986). Cf. Rodriguez, Lewinn and Perlin, "The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders," 14 *Rutgers L.J.* 397 (1983) (discussing misconceptions about the insanity defense). Contrary to these misconceptions, the facts suggest that insanity acquittees spend as much time in confinement as persons convicted of equivalent offenses. *See* Pogrebin, Regoli and Perry, supra, at 240.

including imprisonment, and that acquittal means freedom. Countless news reports and docudramas depict the just-acquitted defendant embracing her lawyer and walking out of the courtroom to freedom. The notion that an acquitted defendant would remain in state custody, as the Insanity Defense Reform Act mandates, seems radically counterintuitive. Yet, the respondent would have this Court believe that jurors can slay that intuition with absolutely no guidance from the court.

Case law suggests otherwise with a real risk of "compromise" guilty verdicts as a result.[6]

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[6] *See, e.g., Evalt v. United States,* 359 F.2d 534, 546 (9th Cir. 1966) ("And affidavits by two jurors state that each of them, and "a few jurors" had and expressed doubt as to Evalt's sanity at the time of the robbery but felt, because of the prosecutor's closing statement, that they had no choice but to convict. They further state that, if they had known that Evalt would receive treatment, they would have voted to acquit."); *Government of V.I. v. Fredericks,* 578 F.2d 927, 935 (1978) ("A juror who feels that a verdict importing freedom for [sic] defendant will endanger the community might, out of his sense of social responsibility, be swayed from rational deliberation and be unwilling to weigh properly the evidence of defendant's mental condition.") and, at 936, ("A juror who is convinced that a defendant is dangerous, but who believes that he did not commit the acts charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal.") *See also*, Schwartz, "Should Juries Be Informed of the Consequences of the Insanity Verdict?", *J.L. & Psychiatry* 167, 174 (1980) ("Jurors may reason, 'Under the n.g.i. verdict, the defendant will not go to prison, and yet he will not be set free either. Committing a possibly innocent person is at least not as harsh as imprisoning him; nor is

The persistence of these misconceptions imperils the second value -- appropriate care and treatment for defendants with legitimate bases for their NGRI pleas.

Whatever the real cause or causes - deinstitutionalization, criminalization of mental illness, better diagnostics, societal and legal attitudinal shifts - there can now be little doubt that persons with mental illness are

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committing a possibly guilty person as dangerous as freeing him '") Finally, the Michigan Supreme Court succinctly described the two possible "compromise" uses of an NGRI verdict after instructions on disposition as follows:

> "(1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and
> (2) the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity.

We conclude that the reasons given in support of the first proposition far outweigh the fear of jury integrity expressed in the second proposition." *People v. Cole,* 172 N.W.2d 354, 366 (Mich. 1969). *See also,* Comment, "The Not Guilty By Reason of Insanity Verdict: Should Juries Be Informed of its Consequences?", 72 *Ky. L. J.* 207, 217 (1983-4).

increasingly part of the population in our nation's correctional system.[7]

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[7] *See also*, National Institute of Mental Health, *The Mentally Disordered Offender*, U.S. Dept of HHS, Rockville, MD (1986). *See, e.g.*, Isaac and Armat, *Madness in the Streets*, Free Press, N.Y. (1990) at 7 ("There are as many individuals suffering from serious mental disorder in our jails and prisons as there are in our public mental hospitals."), at 156 ("Not suprisingly, jail and prison officials complain of experiencing a sharp increase in seriously mentally ill inmates.") *See*, National Alliance for the Mentally Ill and Public Citizen's Health Research Group, *Criminalizing the Seriously Mentally Ill*, (1992) ("A nationwide survey of 1391 local jails, which together hold 62 percent of our nation's jail inmates, has revealed the unimaginable: 7.2 percent of jail inmates - more than one of every 14 inmates - suffer from serious mental illness. . . . [E]ach day over 30,700 seriously mentally ill individuals serve time in our nation's jails; each year, over 11 million days are spent by seriously mentally ill individuals in jail.") *See also*, Gladwell, "Jails Used as Holding Wards for Mentally Ill, Study Finds" The Wash. Post, Sept 10,1992 p.A.2. *But see* Johnson, *Out of Bedlam*, Basic Books, U.S. (1990), 159, ("Although it is true that there are mentally ill in jail, just as there are some violent criminals who are out of their minds, this fact has very

Again, whatever the real cause or causes, there are a wide range of proffered solutions to this problem, including *inter alia* better screening programs, diversion programs and increased reliance on improving the quality of correctional institutional programs for treating mental illness.[8]

For the purposes of this case and the others currently before this Court,[9] however, the narrow issue is the potential for serious harm to defendants with mental illness who do not receive otherwise valid NGRI verdicts as a result of jury misunderstandings about their post-trial disposition.

Given Congress' decision not to abolish

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l i t t l e t o d o w i t h deinstitutionalization.")

[8] *See, e.g.*, Steadman, McCarty and Morrissey, *The Mentally Ill in Jail: Planning for Essential Services*. Guilford Press, N.Y. (1989); *see also* National Institute of Mental Health, *Developing Jail Mental Health Services: Practice and Principles*, U.S. Dept of HHS, Rockville, MD (1986); National Institute of Mental Health, *Survey of Facilities and Programs for Mentally Disordered Offenders*, U.S. Dept of HHS, Rockville, MD (1987); and The National Institute of Justice, *The Special Management Inmate*, Am. Justice Institute, (1985)

[9] See footnote 4 above.

but merely to alter the insanity defense through the Insanity Defense Reform Act,[10] ("IDRA") there can be little debate about the long-standing historic general principle in our law for excusing certain otherwise criminal behavior and addressing the illness that is the basis for that legal excuse.[11] Moreover, even

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[10] Insanity Defense Reform Act of 1984, 18 U.S.C. 4241-4247. *See also* Miller, "Recent Changes in Criminal Law: The Federal Insanity Defense," 46 *La. L.R.* 336, 347 (1985) ("Three state laws have abolished insanity as a defense."); at 347 n.64 ("Legislation introduced into the United States Senate by Senator Strom Thurmond would have abolished the defense of insanity in federal courts. S. 2390, 97th Cong. 2nd Sess. (1982) This bill was reintroduced as S.105, 98th Cong. 1st Sess. (1983) and reported out on August 5, 1983 as part of Title IV of S. 1762, 98th Cong. 1st Sess. (1983).); and at 348, n. 73, regarding states' adoptions of "guilty but mentally ill" ("GBMI") verdicts.

[11] *Hadfield's Case*, 27 How. St. Tr. 1281 (1800), is traditionally cited for its language on informing the jury of the disposition of NGRI acquittal (*see e.g.*, Liu, "Federal Jury Instructions and the Consequence of a Successful Insanity Defense," 93 *Colum. L. Rev.* 1223, 1230, n.31 (1993)). However, the Crown counsel's speech in that case is a model summary of the insanity defense at common law: (". . . {I}f a man is completely

in the context of convicted persons, this Court and others have long held that the provision of appropriate health services, including treatment of mental illness, is guaranteed under the 8th Amendment.[12] Notwithstanding these decisions, however, disputes over the existence and quality of prison mental health services abound in federal court cases over prison conditions.[13] In addition, a prison sentence carries its own form of stigma with resulting discrimination in housing and social services after release into the community.

Finally, it must also be noted that having once been inappropriately

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deranged, so that he know not what he does, if a man is so lost to all sense in consequence of the infirmity of disease, that he is incapable of distinguishing between good and evil - that he is incapable of forming a judgment upon the consequences of the act which he is about to do, that then the mercy of our law says, he cannot be guilty of a crime. . ." *Hadfield's Case*, 27 How. St. Tr., above, at 1286. (emphasis original) *See also* Rodriguez, Le Winn and Perlin, above, for a short history of the insanity defense.

[12] *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392 (1981) and *Inmates of Allegheny Co. Jail v. Pierce*, 617 F.2d 754 (3rd Cir. 1979).

[13] *Austin v. Lehman*, No. 90-7497 (E.D. Pa. filed Nov. 20, 1990).

sentenced to prison, transfers to mental health treatment facilities outside of prison are fraught with issues regarding stigmatization, due process protection and "right to refuse" treatment questions unique to the context of prisoners and forensic patients.[14]

Clearly, then, given the continued questions about the bare availability and adequacy of prison-based mental health treatments, the best guarantee of appropriate treatment for defendants in these cases is the initial appropriate disposition to treatment pursuant to an NGRI verdict under IDRA. Once the first error occurs in that disposition - arguably by failing to address properly the jury's misunderstanding of NGRI dispositions - that error is further compounded by the lack of appropriate treatment for mental illness in prison or through alternative means. In summary, an unsuccessful -though otherwise valid - NGRI plea typically increases the likelihood that the defendant will not receive appropriate care and treatment for his/her mental illness in accordance with their constitutional rights.[15] Amici respectfully submit that this

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[14] *See, e.g.*, ***Washington v Harper***, **494 U.S. 210 (1990)**, ***Perry v. Louisiana***, **__ U.S. ___, 111 S.Ct. 449 (1990)** and ***Vitek v Jones***, **445 U.S. 480 (1980)**.

[15] *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) and *DeShaney v. Winnebago Co. Dept. Soc. Service*, 489 U.S. 189 (1989).

"tragedy" of errors can only be corrected by proper jury instructions regarding NGRI dispositions in the first instance.

B. Notwithstanding *United States v. Rogers*, Juries Should Be Instructed Regarding the Disposition of Persons Found N.G.R.I.

1. *United States v. Rogers* and its Limitations

In cases and commentaries involving the issue of instructions to juries on the disposition of persons found NGRI, it has become *de rigueur* to cite *United States v. Rogers* 422 U.S. 35 (1975) for the proposition that juries and judges each have separate roles in deciding guilt and punishment, respectively.[16] Again and again, the *Rogers* holding is cited as the leading authority for that rule of law in the NGRI jury instruction cases preceding this case,[17] in this case[18] and in the

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[16] *See, e.g., U.S. v. Frank*, 956 F.2d 872, 879 (9th Cir. 1991) (en banc); and *U.S. v. Blume*, 967 F.2d 45 (2nd Cir. 1992); see also Liu, "Federal Jury Instructions and the Consequences of a Successful Insanity Defense", 93 *Colum. L. Rev.* 1223, 1227 n.20 (1993).

[17] Ibid.

[18] *Shannon v. U.S.A.*, 981 F.2d 759, 761 (5th Cir. 1993), *cert.* granted 62 U.S.L.W. 3342 (U.S. Nov 1, 1993) (No. 92-

other cases on this issue currently pending before this Court.[19] The implication is that the *Rogers* "rule" is absolutely settled, uniform and unassailable, and that an instruction on NGRI disposition would be a sole and heretical exception to that rule.

As with many similarly stated rules of law, however, even this *Rogers* rule is subject to some limitations and exceptions. Initially, of course, as many courts have noted specifically, the *Rogers* rule is limited where, by statute, the jury is actually given a role in sentencing itself.[20] Clearly, then, the *Rogers* rule is not applied in the typical capital sentencing scheme where the jury has such a sentencing role.[21] Under this Court's own "death qualification " opinions, jurors are now routinely exposed to *voir dire* as well as court

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[19] See footnote 4 above.

[20] *See, e.g., U.S. v. Frank*, 933 F.2d 1491, 1498 (9th Cir. 1991) ("It is the practice in the federal courts to instruct juries that they are not to be concerned with the consequences to the defendant of the verdict, except where required by statute." (citing *Rogers*) *But see U.S. v. Blume*, 967 F.2d 45,49 (2nd Cir. 1992).

[21] *See, e.g.*, 42 Pa. C.S.A. §9711(1) (1988)

instructions regarding their role in assessing the death penalty *vel non*. Thus, routinely judges in capital cases prepare jurors for the possible sentencing results of their findings in the guilt phase of those cases.[22]

On reflection, there are some other obvious situations where jurors clearly know or have reason to know what is likely to happen to the defendant after their verdict.[23] No doubt, with

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[22] *See, e.g., Wainwright v. Witt*, 469 U.S. 412 (1985); *Lockhart v. McCree*, 476 U.S. 162, (1986); and *Ross v. Oklahoma*, U.S. 487 U.S. 81 (1988). See also Deutsch, "Menendez Trial Draws to Close," Phila. Inq., Dec. 9, 1993 p.A7 ("'The answer to that question may be a life-or-death one for Lyle Menendez' said [defense attorney] Burt, reminding jurors several times that the death penalty was a possibility in the case"). *See also*, for a discussion of the death penalty case variant of a "compromise" verdict, McCall, Comment, "Sentencing by Death Qualified Juries and the Right to Jury Nullification," 22 *Harv J. on Legis*. 289 (1985).

[23] Another arguable line of caselaw exceptions to the *Rogers* rule may be cases involving juveniles being tried as adults since juries may know that a juvenile appearing and convicted before them is going to receive an adult sentence. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361 (1989). Yet another "exception" to *Rogers* in practice

additional research beyond the scope of this case and brief, additional, perhaps less obvious examples of juror knowledge of the likely dispositions would emerge as "exceptions" to *Rogers*.[24] The point is that arguing over instructions regarding NGRI dispositions as though they would be the only exception to the general rule stated in *Rogers*, is misleading and may result in particularly unfair, "compromise" guilty verdicts in these cases.[25]

2. The Jury Should Be Instructed Regarding Disposition of NGRI's.

There is a relative dearth of jury studies about what jurors know, or think

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may occur where evidence of co-defendants' crimes, sentences and plea agreements come before juries as part of direct and/or cross-examination during trials of their accomplices. *See e.g., U.S. v. Leslie*, 542 F.2d 285 (5th Cir. 1976) and *U.S. v. Chilcote*, 724 F.2d 1498, 1504 n.6 (11th Cir., 1984); *See generally*, Note, "Impeaching the Underworld Informant", 63 *So. Cal. L Rev.* 1405, (1990).

[24] *See, e.g.*, Heumann and Cassada, "Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases," 20 *Am. Crim. L. Rev.* 343 (1983).

[25] See footnote 6 above.

that they know, about the disposition of NGRI acquittals.[26] Suffice it to say,

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[26] *But see*, e.g., Simon, *The Jury and the Defense of Insanity*, Little Brown, Boston (1967); Morris, Bozetti, Rush and Read, "Whither Thou Goest? An Inquiry Into Jurors' Perception of the Consequences of a Successful Insanity Defense", 14 *San Diego L. Rev.* 1060 (1977). *See also U.S. v. Frank*, 956 F.2d 872, at 839, ("One empirical study of juries conducted by the University of Chicago Law School showed that juror's concern with what will be done with defendant if he is acquitted by reason of insanity is one of the most important factors in jury deliberations.") (Hug, J. concurring in part and dissenting in part) citing Weihofen, "Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code," 29 *Temp. L.Q.* 235, 247 (1956). In general, studies have shown that the public believes in the following "myth" regarding disposition of NGRI acquittals:

> "#8 MYTH: Most insanity acquitees go free immediately or within a short period of time following their trial.
> REALITY: The majority of acquittees are confined for significant periods of time."

National Commission on the Insanity Defense, *Myths and Realities*, National Mental Health Assoc., Arlington, Va. (1983) p.24.*See also*, footnote 5 above.

the "jury is still out" on any definitive answer to that question, as perhaps it always will be. However, given the existing evidence and the high cost of error in assuming that jurors are not being influenced by misinformation, amici respectfully urge this Court to adopt a rule providing for juror instructions, subject to defendant objection, regarding disposition of NGRI in all such cases, just as jurors are now instructed in cases where there has been a misleading remark by the prosecutor regarding such disposition.[27]

Amici urge adoption of such a rule because as long as there continues to be credible evidence from research that some - perhaps most - jurors do not understand the results of an NGRI holding, then the result of that misunderstanding is identical to the perceived result in cases of misleading prosecutorial comments. To the defendant, it really does not matter how the jurors come to be misled about the disposition of NGRIs: in the interest of fairness, the jurors require a curative instruction to correct their apparent misunderstanding <u>regardless of its cause or source</u>. As many courts and commentators have already noted, jurors already have common knowledge of the disposition of "guilty" and "not guilty" defendants; in this matrix, it is only the NGRI verdict that

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[27] *U.S. v. Birrell*, 421 F.2d 665 (9th Cir. 1970) (prosecutor's comments), *U.S. v. McCracken*, 488 F.2d 406 (5th Cir. 1974) (court instruction).

they may not fully understand, particularly because of the changes in federal law regarding the insanity defense after the *Hinckley* case.[28]

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[28] *See e.g., Lyles v. U.S.*, 254 F.2d 725, 728 (D.C. Cir. 1957) ("It is common knowledge that a verdict of not guilty means a prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insanity has no such common understood meaning. As a matter of fact, its meaning was not made clear in this jurisdiction until Congress enacted the statute of August 9, 1955.") The same might be said of the lack of any "common understood meaning" now of the effects of IDRA, passed by Congress only in 1984, notwithstanding Judge Winters' remarks about the *Hinckley* case in *U.S. v. Blume*, 967 F.2d 45, 54 (2nd Cir. 1992) (Winter J. concurring in result) ("After all, the nation's most celebrated insanity acquittee, John Hinckley, has been confined for over 10 years.") *But see U.S. v. Blume*, 967 F.2d above at 52 (Newman, J. concurring) ("It [not giving an NGRI disposition instruction] may well have made sense before 1984 <u>to protect</u> the defendant from the risk of an undeserved guilty verdict by keeping jurors ignorant of the fact that a successful insanity defense would result in the defendant's release from federal custody.") (emphasis original) Finally, as to the much travelled language regarding jury instructions on NGRI

The bare minority of federal cases that have required such instructions regarding NGRI disposition include cases involving both "active" misleading remarks and "passive" juror misunderstanding. However, there is a striking similarity between the typical prosecutorial misleading comment and the usual expression of juror misunderstanding.[29] Given that

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disposition from Senate Report, No. 98-225, 98th Cong., 1st Sess. 240 (1983), Judge Neuman's concurrence in *U.S. v. Blume*, 967 F.2d 48, 53 n.5 (2nd Cir. 1992) (Newman, concuring) provides the best insight on the comment's intended effect in <u>requiring</u> an instruction on NGRI disposition subject only to a defense objection: "Because of the Committee's explicit endorsement of the D.C. Circuit's mandatory instructional rule, I agree with Judge Arnold that the use of the word "may" in the passage quoted from the Committee's report must be understood to contemplate the exercise of discretion only when the defendant objects to an instruction, as the report's very next sentence makes clear."

[29] *Compare Evalt v. United States*, 359 F.2d 534, 545 ("The final sentence of the closing argument for the government is as follows: 'If you find him not guilty, he <u>walks out</u> of this courtroom a free man, and I know ladies and gentlemen, that you are not going <u>to turn this man loose again</u> on society.'")

similarity, the analogy between these two types of cases seems more than apt.

Finally, we must address the issue of the threat that NGRI disposition instructions may result in NGRI as a "compromise" verdict where a jury might otherwise acquit, but remains concerned about public safety. The answer to that perceived dilemma is clear, however, once the instruction becomes a defense choice, as it would have been here in *Shannon*. This Court has already noted that even within the correction system, mental illness carries a substantial stigma.[30] Given that stigma and the low success

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(emphasis added); *U.S. v. Birrell*, 421 F.2d 665, 666 (9th Cir. 1970) ("turn him loose on society") with *Government of V.I. v. Fredericks*, 578 F.2d 927, 933 (1975) ("walk out") (defense counsel's characterization of jury response); *U.S. v. Blume*, 967 F.2d above at 54 (Winter, J., concuring in result) ("For example, if a witness or a prosecutor made a statement implying that a particular would go free if acquited by reason of insanity. . . ."") (emphasis added) and (". . . [A] particular jury may think that insanity acquitees usually go free. . . ."") (emphasis added) Liu, "Federal Jury Instruction and the Consequence of a Successful Insanity Defense" 93 *Col. L.R.* 1223 (1993) ("'I did not want a mad dog released' - Anonymous Juror").

[30] *Vitek v. Jones*, 445 U.S. 480 (1980).

rate of NGRI pleas,[31] limiting the jury instruction on NGRI disposition to cases where the defendant exercises that choice, or at least does not object, would balance any fears of a compromise NGRI verdict arising from what otherwise might have been an acquittal.

IV. Conclusion

For the foregoing reasons, amicus curiae, the Coalition for the Free, respectfully urges this Court to reverse the judgment below.

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[31] See, e.g., Puente, "6th N.Y. rampage victim dies, 'Defense of last resort': insanity," U.S.A. Today, Dec. 13, 1993, p.3A ("The man accused of the shooting rampage that killed six Long Island commuters may use what lawyers call 'the defense of last resort': insanity.")